IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87193
	)	
GLEN E. McGOWAN,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE KEITH M. SUTHERLAND, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

Amy M. Bartholow, MOBar #47077
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594
Amy.Bartholow@mspd.mo.gov

INDEX

Page

TABLE OF AUTHORITIES

Page

CASES:

CONSTITUTIONAL PROVISIONS:

***STATUTES*:**

***MISSOURI COURT RULES*:**

JURISDICTIONAL STATEMENT

A Montgomery County jury acquitted Appellant, Glen McGowan, of two counts of possession of a controlled substance, cocaine and codeine, Section 195.202 RSMo 2000;[1] however, the jury found Mr. McGowan guilty of first degree tampering, Section 569.080. The Honorable Keith M. Sutherland sentenced Mr. McGowan to ten years imprisonment, and Mr. McGowan appealed. A majority of the Eastern District Court of Appeals' three-judge panel, the Honorable Judges Mary K. Hoff and Lawrence E. Mooney, reversed Mr. McGowan's conviction and remanded for a new trial, finding harmful error in the prosecution's direct comment on Mr. McGowan's right to testify, "Mr. McGowan, did you want to take the stand?" The Honorable Kenneth R. Romines, however, dissented and transferred Mr. McGowan's case to this Court pursuant to Rule 83.03, based on his view that the majority opinion is contrary to *State v. Neff*, 978 S.W.2d 341 (Mo. banc 1998). This Court has jurisdiction over this case under Article V, Section 10, Mo. Const. (as amended 1976)

[1] Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

The State charged Mr. McGowan with two counts of possession of a controlled substance, cocaine and codeine, and one count of tampering for unlawfully operating a 1992 red and white Chevrolet S-10 pickup truck (LF 16-17).[2] Because the jury acquitted Mr. McGowan of both drug possession charges, this brief will not make extensive references to the evidence presented on those charges. The State presented the following evidence in support of the tampering charge:

On the morning of March 20, 2003, Charles Brown[3] stole a red and white Chevrolet S-10 truck that belonged to Ocbai Tekla (TR 88-92, 220). Mr. Brown stole it by breaking the steering column to bypass the ignition (TR 147-148). Brown would later show a State Trooper how to get the truck started without the keys (TR 175).

On the evening of March 22, Mr. Brown and his girlfriend, Sharon Malone, picked up Barbara Bost in the stolen Chevy truck (TR 179-180, 208). They rode around for a few hours, ingesting drugs (TR 181). At approximately 3:00 the next morning, Brown, Malone and Bost went to Mr. McGowan's apartment and woke him up (TR 181).[4] Ms. Bost had never met Mr. McGowan before, and Mr. Brown introduced them (TR 178, 209). The three stayed at Mr. McGowan's apartment and fell asleep (TR 181). When

---

[2] The record on appeal consists of a legal file (LF) and a transcript (TR).

[3] Mr. Brown has several aliases, including "Red," "Charlie Brown," "James Gillespie" and "Moody" (TR 116, 125, 165, 207, 214). He will be referred to herein as Mr. Brown.

[4] Mr. Brown and Mr. McGowan were friends (TR 202, 212).

they woke up, Mr. Brown, Ms. Malone and Ms. Bost consumed more drugs (TR 182). Mr. McGowan, according to the State's witnesses, did not take drugs (TR 182, 189, 219).

The group decided to drive to Columbia to "party" (TR 182, 211). Mr. McGowan went along for the ride because he wanted to get to know Ms. Bost (TR 182-183, 204-205, 235). They all left in Brown's stolen Chevy truck; Brown drove the truck, Ms. Malone sat in the front passenger seat, and Mr. McGowan and Ms. Bost sat in the back seat (TR 183, 211). Ms. Malone knew that the truck was stolen, but she did not tell Mr. McGowan (TR 220).

Around noon, they stopped at a restaurant (TR 185-186). After eating, Mr. Brown continued to drive the group towards Columbia on Interstate 70 (TR 186). Mr. Brown pulled off of the Interstate in Wentzville to steal another truck, although he did not tell the others that he was going to steal a truck (TR 186-187, 195, 220). Mr. Brown and Ms. Malone got out of the Chevy truck and into a black Ford F150 pickup truck that was parked at a lumber yard (TR 96-98, 111, 187, 211). Mr. Brown and Ms. Malone then drove away in the black Ford truck (TR 187).

Ms. Bost and Mr. McGowan were left in the Chevy truck; Ms. Bost climbed into the driver's seat and began to follow the black truck towards Columbia (TR 187, 212, 220). Bost was not certain that the Chevy truck she was driving was stolen, but she thought it might be because Mr. Brown always has different trucks (TR 188, 195). Somewhere along I-70, Ms. Bost started "nodding off," so she pulled over on the highway and asked Mr. McGowan to drive (TR 187-188, 205). They fell far behind the black Ford truck (TR 188).

Trooper Mark Broniec received a call about the stolen black Ford truck that Mr. Brown was driving (TR 111, 123). Guessing that the truck might be heading west-bound on I-70, Trooper Broniec parked his patrol car in a cross-over just east of the Warrenton exit (TR 111, 124). Almost immediately, the black truck drove by him (TR 112). Trooper Broniec pulled out and caught up with Mr. Brown near Truxton, Exit 188 (TR 112, 124). As Broniec closed in on the black truck, Mr. Brown sped up and started to weave through traffic (TR 113). The truck passed the Truxton exit ramp, but then cut across the interstate from the passing lane and back up onto the exit ramp (TR 113-114).

Trooper Broniec activated his emergency lights and followed the black truck up the ramp (TR 114). Mr. Brown abruptly stopped the truck on the exit ramp, got out and started to run back toward the Interstate (TR 114, 125).

Nicole Barnes was also traveling along I-70 at this time (TR 101). As she exited at Truxton to get gas and a soda, she saw Trooper Broniec's patrol car parked on the off ramp (TR 102). She saw Trooper Broniec open his door and point his gun at the truck in front of him (TR 102). She saw Mr. Brown and Ms. Malone exit the truck and began running in opposite directions (TR 103, 115). Malone was running toward the outer road, and Brown ran toward the Interstate (TR 103).

Trooper Broniec knew that he could not catch Brown because Brown was running too fast, so he pursued Malone, caught her and placed her under arrest (TR 115).[5]

[5] Ms. Malone was transported to the hospital because she was high on heroin (TR 126-127).

Although Broniec lost sight of Brown, Ms. Barnes observe Brown as he ran across the Interstate and jumped into the bed of a red and white Chevy S-10 that was sitting on the left hand shoulder underneath the overpass (TR 104, 109, 190-191). Ms. Bost and Mr. McGowan had slowed down when they saw Mr. Brown walking down the highway (TR 190-193). Ms. Barnes told Trooper Broniec what she had seen, and Broniec radioed the information to Troop C headquarters (TR 105-106, 116-117).

Based upon Broniec's information, Trooper Anthony Maddox took up a position in a cross-over point on I-70 to watch for the red and white Chevy truck (TR 134). He also received calls that Mr. Brown had climbed from the bed of the truck into the truck as it was driving down the road (TR 138).[6]

Trooper Maddox eventually saw the Chevy truck go by him, with Mr. McGowan at the wheel (TR 135). Maddox pulled out immediately and activated his lights (TR 135). Mr. McGowan pulled to the right lane and then exited the Interstate at the first exit, Highway 19 (TR 136). Mr. McGowan stopped at the top of the exit ramp, turned onto Highway 19 and stopped on the paved, level shoulder (TR 137-138, 158).

Trooper Maddox opened his door, pointed a shotgun at Mr. McGowan and ordered him to turn the engine off and throw the keys out of the vehicle (TR 139). Mr. McGowan stuck his head out the window and yelled that there were no keys (TR 139, 162). Several other deputies arrived and Mr. McGowan, Ms. Bost and Mr. Brown were taken into

[6] The truck had a sliding glass back window (TR 149). Ms. Bost testified that they stopped so that Mr. Brown could get into the passenger compartment (TR 193).

custody (TR 141). Mr. Brown and Ms. Bost were both high on drugs (TR 152-153, 160, 196-197).[7]

Mr. McGowan, however, was calm, cooperative and helpful with the Troopers (TR 150). He did not attempt to fight or flee (TR 152). He gave them his correct name (TR 166). Mr. McGowan was not under the influence of any substance (TR 152-153, 174-175). He told the troopers that he did not know what was going on; he had just met Ms. Bost[8] and he was going with them to a party in Columbia (TR 152, 166, 176). Mr. McGowan said that Mr. Brown had provided the vehicle, and that Mr. McGowan did not know how to get the truck started (TR 169). He did not know that the truck was stolen (TR 170, 176).

During Ms. Bost's testimony, the State elicited from her that she had pleaded guilty to all of the crimes for which Mr. McGowan was on trial (TR 198-202). Specifically on the tampering charge, she testified:

> Q: And you also pled guilty to being in possession, tampering first, of that red truck?
>
> A: Right.
>
> Q: Is that right?

---

[7] Mr. Brown had to be taken to the hospital, where he had to be given Narcan, an antagonist that breaks down heroin (TR 126).

[8] Ms. Bost had just met Mr. McGowan that day, and at trial, she thought his name was Billy (TR 178).

A: Mmh-hmm.

Q: And by that you had to know that the red truck was stolen; right?

A: Mmh-hmm.

Q: Is that a yes?

A: Yes.

(TR 199). There is no indication in either her direct or cross examination that Ms. Bost received any type of plea deal to testify against Mr. McGowan.

During Ms. Malone's testimony, the prosecutor elicited that Ms. Malone had also pled guilty to drug and tampering charges arising out of the same incident for which Mr. McGowan was on trial (TR 218). There is also no indication in the transcript that Ms. Malone received any benefit from the prosecutor for her testimony against Mr. McGowan.

During the testimony of the State's last witness, Trooper Maddox, Mr. McGowan said aloud, "He's lying." (TR 236). In front of the jury, the prosecutor turned to Mr. McGowan and said, "Mr. McGowan, did you want to take the stand?" (TR 236). Defense counsel approached the bench and requested a mistrial because of the prosecutor's comment (TR 236). The request was denied (TR 236-237). The trial court wanted "to let it pass at this point without mentioning it to the jury and telling them to disregard it." (TR 236-237).

Mr. McGowan did not testify (TR 248-249). However, Mr. McGowan did present evidence that at the time that Mr. Brown was stealing the Chevy truck, Mr. McGowan was working at his job at Elliott Tool and Manufacturing Company (TR 243-244).

Mr. McGowan offered a version of the verdict director for tampering in the first degree with the additional language giving effect to Mr. McGowan's claim of right defense (TR 250-251). The trial court refused the Instruction and labeled it "Instruction No. A" (TR 251; LF 41; Appendix A-1).

During the prosecutor's closing argument, while urging that Mr. McGowan was guilty of tampering, the prosecutor reminded the jury that, "Even Barbara Bost said yeah I probably knew it was stolen, too. She didn't want to admit it, although she had pled guilty to it." (TR 256). The prosecutor also reminded the jury that co-defendants Bost and Malone had pleaded guilty and had implicated Mr. McGowan during their pleas (TR 267).

The jury acquitted Mr. McGowan of both drug charges (TR 271-275). However, the jury found Mr. McGowan guilty of first degree tampering (TR 271-275; LF 39). Judge Sutherland sentenced Mr. McGowan to ten years imprisonment (TR 285-286; LF 48-49). This appeal follows.

POINTS RELIED ON

I.

The trial court abused its discretion in overruling Mr. McGowan's motion for mistrial after the prosecutor asked Mr. McGowan in front of the jury, "Mr. McGowan, did you want to take the stand?" because this comment was a direct reference to Mr. McGowan's exercise of his right not to testify and violated Mr. McGowan's rights to due process, a fair trial before a fair and impartial jury, and to not be penalized for not testifying, guaranteed by the U.S. Const., Amendments 5, 6, & 14th, Art. I, §§ 10, 18(a) & 19 of the Mo. Const., Section 546.270, and Rule 27.05(a), in that, Mr. McGowan did not testify at trial and Mr. McGowan's prior remark about Trooper Maddox – "He's lying" – did not open the door to such a prejudicial comment by the prosecutor.

State v. Neff, 978 S.W.2d 341 (Mo. banc 1998);

State v. Bulloch, 785 S.W.2d 753 (Mo. App., E.D. 1990);

People v. Mercado, 120 A.D.2d 619 (N.Y. App. Div. 1986);

People v. Cora, 47 A.D.2d 739 (N.Y. App. Div. 1975);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Art. I, Section 10, 18(a) & 19;

Section 546.270 and

Rule 27.05(a)

II.

The trial court erred in refusing to instruct the jury on the offense of tampering in the first degree, pursuant to defense counsel's proffered "Instruction A," because such ruling violated Mr. McGowan's rights to present a defense, to due process of law and to a fair trial, as guaranteed by the 5th, 6th & 14th Amendments to the U.S. Const., and Art. I, Sections 10 & 18(a) of the Mo. Const., in that proffered "Instruction A" gave effect to Mr. McGowan's claim of right defense, which he injected through the testimony of Barbara Bost, who testified that she was high on heroin and was "nodding off" while driving on the Interstate, and she pulled to the side of the Interstate and asked Mr. McGowan to drive. Since Mr. McGowan injected this defense, and there was evidence to support it, it created a jury question regarding whether such evidence provided "reasonable grounds" for Mr. McGowan to believe that he had a right to operate the vehicle without the owner's consent.

State v. Bell, 743 S.W.2d 907 (Mo. App., E.D. 1988);

State v. Smith, 684 S.W.2d 576 (Mo. App., S.D. 1984);

State v. Quisenberry, 639 S.W.2d 579 (Mo. banc 1982);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Art. I, Section 10 & 18(a); and

Sections 556.051 & 569.130.

III.

The trial court plainly erred, resulting in manifest injustice, in failing to instruct the jury to disregard or to declare a mistrial *sua sponte* when: 1) the prosecutor elicited evidence of the plea dispositions of codefendants Bost and Malone, and 2) during closing argument, the prosecutor reminded the jury that two of Mr. McGowan's co-defendants had pleaded guilty to the crimes for which Mr. McGowan was on trial, in violation of Mr. McGowan's rights to due process of law and a fair trial before a fair and impartial jury, guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, and the right to a separate trial secured by Section 545.880 and Rule 24.06, in that the co-defendants plea dispositions were not relevant to preemptively rehabilitate them because they were not testifying pursuant to a deal, and even if minimally relevant to their credibility, the evidence was still inadmissible as substantive evidence of Mr. McGowan's guilt, but the prosecutor used the co-defendants plea dispositions as a substantive argument for why the jury should also convict Mr. McGowan.

State v. White, 952 S.W.2d 802 (Mo. App., E.D. 1997);

State v. Borden, 605 S.W.2d 88 (Mo. banc 1980);

State v. Boyd, 954 S.W.2d 602 (Mo. App., W.D. 1997);

State v. Yingst, 651 S.W.2d 641 (Mo. App., S.D. 1983);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Section 10 & 18(a);

Section 545.880 and

Rules 4-3.8, 24.06 & 30.20.

ARGUMENT

I.

The trial court abused its discretion in overruling Mr. McGowan's motion for mistrial after the prosecutor asked Mr. McGowan in front of the jury, "Mr. McGowan, did you want to take the stand?" because this comment was a direct reference to Mr. McGowan's exercise of his right not to testify and violated Mr. McGowan's rights to due process, a fair trial before a fair and impartial jury, and to not be penalized for not testifying, guaranteed by the U.S. Const., Amendments 5, 6, & 14th, Art. I, §§ 10, 18(a) & 19 of the Mo. Const., Section 546.270, and Rule 27.05(a), in that, Mr. McGowan did not testify at trial and Mr. McGowan's prior remark about Trooper Maddox – "He's lying" – did not open the door to such a prejudicial comment by the prosecutor.

During the testimony of the State's last witness, Trooper Maddox, Mr. McGowan, who was seated at counsel table, stated, "He's lying." (TR 236). In front of the jury, the prosecutor turned to Mr. McGowan and said, "Mr. McGowan, did you want to take the stand?" (TR 236). Defense counsel asked to approach the bench and requested a mistrial because of the prosecutor's comment (TR 236). The request was denied (TR 236-237). The trial court "wanted to let it pass at this point without mentioning it to the jury and telling them to disregard it." (TR 236). Mr. McGowan did not testify (TR 248-249). Defense counsel renewed his objection to the prosecutor's comment in the motion for new trial (LF 45).

Whether a particular improper statement is so prejudicial under the facts in a particular case is largely within the discretion of the trial court. ***State v. Pope*, 50 S.W.3d 916, 922 (Mo. App., W.D. 2001)**. Appellate review is for an abuse of discretion. ***Id.*** When the trial court takes prompt and appropriate remedial action to protect the defendant by instructing the jury to disregard the remark, a mistrial is generally not warranted. ***State v. Neff*, 978 S.W.2d 341, 345 (Mo. banc 1998).** Here, however, the trial court gave no limiting instruction and it overruled Mr. McGowan's request for a mistrial.

It has long been recognized that any reference to the fact a criminal defendant did not testify is strictly forbidden. ***Griffin v. California*, 380 U.S. 609, 615 (1965)**. The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." ***Estelle v. Smith*, 451 U.S. 454, 467-468 (1981)** (citations omitted). Missouri courts have also long held that comments on the exercise of the defendant's right not to testify are forbidden. ***State v. Neff*, 978 S.W.2d at 344**; *see also* **Section 546.270 RSMo 2000; Rule 27.05(a)**. Such references are prohibited because they violate a defendant's freedom from self-incrimination and right not to testify as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution. ***State v. Jackson*, 792 S.W.2d 21, 23 (Mo. App., E.D. 1990)** ("It is an elemental precept that remarks which call the jury's attention to whether the defendant testifies or which influence the

defendant to testify are proscribed"). The purpose of the rule is obvious: to keep from the jury any hint of the constitutional right against self-incrimination. ***State v. Cockrum,* 592 S.W.2d 300, 302 (Mo. App., E.D. 1979**). References which include "defendant" and "testify," or their equivalents, constitute reversible error. ***State v. Gleason,* 813 S.W.2d 892, 897 (Mo. App., S.D. 1991)**.

Section 546.270 and **Rule 27.05(a)** strictly proscribe direct and certain references to the defendant's failure to testify. ***State v. Sidebottom,* 753 S.W.2d 915, 920 (Mo. banc 1988)**. A direct reference will use words such as "testify," "accused," or "defendant" or their equivalent. ***State v. Richardson*, 923 S.W.2d 301, 314 (Mo. banc 1996)**; ***State v. Bulloch,* 785 S.W.2d 753, 755 (Mo. App., E.D. 1990)**. There is no question that the prosecutor's comment here was a "direct reference." He used the words "Mr. McGowan" and "did you want to take the stand?" (TR 236).

In ***State v. Neff, supra,*** this Court stated that "[o]bviously, if an objection to a prosecutor's direct reference is made and overruled, a new trial will be ordered on appeal." **978 S.W.2d at 345.** That is precisely what happened here. The prosecutor made a direct reference, defense counsel objected and the trial court overruled the objection (TR 236-237). The trial court, on its own initiative, decided that it was going to let the comment pass without highlighting it to the jury by telling them to disregard it. But without any remedial action, such comment mandates the declaration of a mistrial if one is requested. ***Bulloch,* 785 S.W.2d at 755**.

In ***Jackson, supra,*** the defendant stood trial for purchasing shoes with a stolen credit card. **792 S.W.2d at 21**. While cross-examining the sales clerk, defense counsel

asked her if she could identify the defendant's shoe size just by looking at him. ***Id.* at 22**. The following exchange then occurred:

> [Defense Counsel]: Mark [the defendant], why don't you stand up.
>
> [Witness]: Um-hum.
>
> [Defense Counsel]: What size shoes are these?
>
> [Witness]: I would say 9 and a half or ten.
>
> [Defense Counsel]: Are they, Mark?
>
> THE DEFENDANT: What size are they?
>
> [Prosecutor]: Well, Judge, wait. I'm going to object at this point.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: What's the objection?
>
> [Prosecutor]: Not a proper foundation, first off. They're his shoes. ***If he wants to testify concerning the size of his shoes, he can.*** It's improper.

***Id.* at 23** (emphasis added).

In that case, as here, the defense moved for a mistrial, which was denied. The Eastern District reversed, stating,

> We hold that the prosecutor's remark that "[i]f [defendant] wants to testify . . . he can" constituted a direct infringement upon the defendant's basic constitutionally right against self-incrimination. The statement not only called the jury's attention to defendant's subsequent failure to testify at trial but also could be perceived as a challenge to induce defendant to testify.

Id. The Court held that the trial court prejudicially erred and should have granted the motion for a mistrial. ***Id.*** Just as the trial court erred to the defendant's prejudice in ***Jackson***, the court below prejudicially erred in this case.

A majority of the Eastern District panel applied this Court's analysis in ***State v. Neff***, *supra*, to the comment made by the prosecutor in Mr. McGowan's case. ***State v. McGowan***, ED85114 (September 27, 2005). Following ***Neff***, the majority "consider[ed] the [prosecutor's] comment in the context in which it appear[ed]." *Id*., Slip Op. at 6. In doing so, the majority concluded that "the Defendant's two-word statement did not open the door to the State's direct reference." *Id.* at 7. Furthermore, the majority concluded,

> [C]onsidering the context of the State's question, we conclude it was improper. Although the State's comment purported to respond to Defendant's allegation of false testimony by a State witness, the State had other means available to it to curtail further unsworn comments by Defendant, including the State saying something out of the presence of the jury and requesting the court to admonish and to warn Defendant against future outbursts.

Id. While dissenting Judge Romines transferred this case to this Court because of his believe that "the decision in this matter is contrary to ***State v. Neff***," the majority's analysis clearly shows that it considered and applied ***Neff*** in evaluating the prosecutor's comment in the context within which it was made.

But in addition to its congruence with ***Neff***, the Eastern District majority properly held that the prosecutor's comment was not a "fair response" to Mr.

McGowan's two-word statement, under the precedent of ***United States v. Robinson*, 485 U.S. 25 (1988)**. A prosecutor is not precluded from making "a *fair* response to a claim made by defendant or his counsel." ***Id*. at 32** (emphasis added). But to apply this exception, this Court must find that the prosecutor's comment was a "*fair* response" when examined "in context." ***Id.***

In ***Robinson***, defense counsel mentioned several times in his closing argument that the government did not allow the defendant, who did not testify, to explain his side of the story and had unfairly denied him the opportunity to explain his actions. ***Id.* at 25**. The prosecutor in rebuttal remarked that the defendant "could have taken the stand and explained to you anything he wanted to. The United States of America has given him, throughout, the opportunity to explain." ***Id.*** The Supreme Court held the prosecutor's statements, in light of defense counsel's comments, did not infringe upon the defendant's Fifth Amendment rights. ***Id.* at 32-33**. This is vastly unlike what transpired in Mr. McGowan's case.

Mr. McGowan has not found any case in Missouri on point, but other courts have reversed for similar prejudicial comments. ***See People v. Mercado*, 120 A.D.2d 619, 620-21 (N.Y. App. Div. 1986)** (court's comment in response to defendant's outburst that defendant "had an opportunity to make a statement under oath if he so desired" is reversible error); ***People v. Cora*, 47 A.D.2d 739, 739-40 (N.Y. App. Div. 1975)** (after defendant allegedly offered to take a lie detector test, the judge's statement, "Let [the defendant] take the stand," in the presence of the jury, was reversible error despite later instruction that no inference could be drawn from his failure to testify).

There are several other ways that the prosecutor could have handled this situation, without directly inviting Mr. McGowan to take the stand in front of the jury. First and foremost, he could have asked to approach the bench and discussed the situation out of the hearing of the jury. The trial court then could have admonished Mr. McGowan, even in front of the jury, that it would allow no further outbursts. Instead, the prosecutor decided to make a highly prejudicial comment in response to a minor statement by Mr. McGowan. The jury already knew that defense counsel was attempting to discredit the officer's testimony, and Mr. McGowan's two-word statement, "He's lying," did not prejudice the State. The prosecutor's direct reference inviting Mr. McGowan to take the stand, however, was extremely prejudicial to Mr. McGowan.

Again, this Court has made clear, "if an objection to a prosecutor's direct reference is made and overruled, a new trial will be ordered on appeal." ***Neff*, 978 S.W.2d at 345**. The prosecutor's comment was not harmless, especially in light of the jury's not guilty verdicts on two of the three charges. The prosecutor's comment may have directed the jury's attention to the fact that Mr. McGowan did not testify about the tampering charge – the one charge with which the jury was obviously struggling. Both co-defendants testified that Mr. McGowan had no idea that the truck was stolen, but the jury may have wanted to hear from Mr. McGowan after the prosecutor invited him to testify. The trial court abused its discretion in failing to grant a mistrial in the face of such a prejudicial comment, and this Court must reverse and remand for a new trial.

II.

The trial court erred in refusing to instruct the jury on the offense of tampering in the first degree, pursuant to defense counsel's proffered "Instruction A," because such ruling violated Mr. McGowan's rights to present a defense, to due process of law and to a fair trial, as guaranteed by the 5th, 6th & 14th Amendments to the U.S. Const., and Art. I, Sections 10 & 18(a) of the Mo. Const., in that proffered "Instruction A" gave effect to Mr. McGowan's claim of right defense, which he injected through the testimony of Barbara Bost, who testified that she was high on heroin and was "nodding off" while driving on the Interstate, and she pulled to the side of the Interstate and asked Mr. McGowan to drive. Since Mr. McGowan injected this defense, and there was evidence to support it, it created a jury question regarding whether such evidence provided "reasonable grounds" for Mr. McGowan to believe that he had a right to operate the vehicle without the owner's consent.

Barbara Bost and Mr. McGowan were eventually alone in the stolen Chevy pick-up truck, and Ms. Bost was driving (TR 187, 212, 220). She did not know for sure that the truck was stolen, but she figured it might be because Mr. Brown always had different trucks (TR 188, 195). Somewhere on Interstate 70, Ms. Bost, high on drugs, started "nodding off"; therefore, she pulled over on the shoulder, asked Mr. McGowan to drive, and he did (TR 187-188, 205).

Based on Ms. Bost's testimony, Mr. McGowan offered a version of the verdict director for tampering in the first degree with an optional fourth paragraph, which included additional MAI language giving effect to Mr. McGowan's claim of right defense (TR 250-251). It read as follows:

INSTRUCTION NO. A

As to Count ___, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about March 22, 2003, in the County of Montgomery, State of Missouri, the defendant knowingly operated a certain 1992 Red and white Chevrolet S-10 pick-up truck, VIN: 1GCCS19SZON2108631, being an automobile owned by Zaid Adhanom, and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated it, knowing that he did so without the consent of the Owner, and

Fourth, that defendant did not reasonably believe that he had a right to operate The automobile without the consent of the owner,

Then you will find the defendant guilty (under Count __) of tampering in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, in order for a belief to be reasonable, there must be reasonable grounds for such belief.

MAI-CR3d 323.22

Submitted by Defendant

(LF 41). The trial court refused the Instruction and labeled it "Instruction No. A" (TR 251; LF 41; Appendix A-1). Mr. McGowan raised the failure to give this Instruction A as error in his motion for new trial (LF 45).

Whether a jury was properly instructed is a question of law and, as such, is reviewed *de novo* on appeal. ***Harvey v. Washington,* 95 S.W.3d 93, 97 (Mo. banc 2003)**. Appellate courts will, however, view the evidence in the light most favorable to the submission of the instruction to the submission of the instruction and disregard all contrary evidence and inferences. ***State v. Gilbert,* 103 S.W.3d 743, 748 (Mo. banc 2003)**.

A "claim of right" defense is available to a tampering charge. See **Section 569.130.1**. The defendant has the burden of injecting the issue of claim of right into the case. **Section 569.130.2**; ***State v. Bell,* 743 S.W.2d 907, 908 (Mo. App., E.D. 1988).** "[C]laim of right is a special negative defense and inherent in its concept is that the act charged occurred, but by reason of the defense, the act did not possess the qualities of criminality." ***State v. Smith,* 684 S.W.2d 576, 580 (Mo. App., S.D. 1984)**. When a defendant has the "burden of injecting" an issue, the issue is not submitted to the trier of fact unless supported by evidence. See **Section 556.051(1); *State v. Quisenberry,* 639 S.W.2d 579, 582 (Mo. banc 1982).**

Mr. McGowan argued that he was entitled to a claim of right defense because, even if the evidence showed that Mr. McGowan should have known that the truck was stolen, his act of driving it did not possess the qualities of criminality. He operated the truck *only because* Ms. Bost was falling asleep at the wheel, and she pulled to the side of the Interstate and asked him to drive. When viewed in the light most favorable to the giving of the instruction, the evidence presented a valid question regarding whether Mr. McGowan's belief that he had a right to operate the truck, was a reasonable one. Such issue should have been resolved by the jury and the trial court erred if failing to give Instruction A, which included language regarding Mr. McGowan's claim of right defense. This Court must reverse and remand for a new trial.

III.

The trial court plainly erred, resulting in manifest injustice, in failing to instruct the jury to disregard or to declare a mistrial *sua sponte* when: 1) the prosecutor elicited evidence of the plea dispositions of codefendants Bost and Malone, and 2) during closing argument, the prosecutor reminded the jury that two of Mr. McGowan's co-defendants had pleaded guilty to the crimes for which Mr. McGowan was on trial, in violation of Mr. McGowan's rights to due process of law and a fair trial before a fair and impartial jury, guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, and the right to a separate trial secured by Section 545.880 and Rule 24.06, in that the co-defendants plea dispositions were not relevant to preemptively rehabilitate them because they were not testifying pursuant to a deal, and even if minimally relevant to their credibility, the evidence was still inadmissible as substantive evidence of Mr. McGowan's guilt, but the prosecutor used the co-defendants plea dispositions as a substantive argument for why the jury should also convict Mr. McGowan.

On direct examination, the prosecutor elicited from Barbara Bost that she had pleaded guilty to all of the crimes for which Mr. McGowan was on trial (TR 198-202). Specifically on the tampering charge, she testified:

Q: And you also pled guilty to being in possession, tampering first, of that red truck?

A: Right.

Q: Is that right?

A: Mmh-hmm.

Q: And by that you had to know that the red truck was stolen; right?

A: Mmh-hmm.

Q: Is that a yes?

A: Yes.

(TR 199). There is no indication in either her direct or cross examination that Ms. Bost received any type of plea deal to testify against Mr. McGowan.

During Sharon Malone's direct examination, the prosecutor elicited that she had also pled guilty to drug and tampering charges arising out of the same incident for which Mr. McGowan was on trial (TR 218). There is also no indication in the transcript that Ms. Malone received any benefit from the prosecutor for her testimony against Mr. McGowan.

It is a general and well established rule that a codefendant's conviction or plea of guilty is inadmissible at the trial of others accused of the crime. ***State v. White*, 952 S.W.2d 802 (Mo. App., E.D. 1997)**; ***State v. Borden*, 605 S.W.2d 88, 90 (Mo. banc 1980)**. Where two or more persons are separately charged for the same crime, "it is deemed error, usually reversible error, to show in evidence or tell the jury that a jointly accused defendant has been convicted or plead guilty." ***State v. Fenton*, 499 S.W.2d 813, 816 (Mo. App., S.D. 1973)**. "Thus, a defendant is entitled to be tried on his own without having his guilt prejudged by what has happened to another, it being considered

an elementary principle of justice that one man shall not be affected by another's act or admission, to which he is a stranger." ***Id.***

Mr. McGowan acknowledges that his attorney failed to object when the prosecutor introduced evidence of the co-defendants pleas of guilty and when the prosecutor argued the codefendants guilt as evidence of Mr. McGowan's guilt. He asks for plain error review under Rule 30.20. Plain error results where "the alleged error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice inexorably results, if left uncorrected." ***State v. Hadley,* 815 S.W.2d 422, 423 (Mo. banc 1991)**. Improper references to the disposition of a co-defendant's case have been found to rise to the level of plain error. ***See State v. Jordan,* 627 S.W.2d 290, 293 (Mo. banc 1982)** (holding that the right to a fair and impartial trial is a substantial right within the meaning of the plain error rule); ***see also State v. Borden,* 605 S.W.2d at 90*; State v. Fenton, supra,* 499 S.W.2d at 817-818;** and ***State v. Johnson,* 787 S.W.2d 872, 873-874 (Mo. App., E.D. 1990)** (holding as ***Jordan, supra***, that plain error review was appropriate for the same claim Mr. McGowan makes here).

Admission of the disposition of a co-defendant's case, whether by conviction, plea or acquittal, has also been held to dissipate the value of the defendant's right to a separate trial secured by **Section 545.880** and **Rule 24.06**. ***State v. White,* 952 S.W.2d at 805; *State v. Aubuchon,* 381 S.W.2d 807, 816 (Mo. 1964)**. It is also inconsistent with the theory of the statute abolishing the distinction between principals and accessories, in that "…every defendant who joins in the commission of a crime is liable, on his own, as a principal; but he is also entitled to be tried on his own without having his guilt pre-judged

by what has happened to his co-defendant…" ***State v. White,* 952 S.W.2d at 805 (*quoting State v. Johnson,* 456 S.W.2d 1, 3-4 (Mo. 1970))** (emphasis in original).

In ***State v. Borden, supra***, this Court recognized an exception to the general rule. It held that although evidence of a co-defendant's related criminal disposition, including any plea agreement, could not be used as substantive evidence to prove his guilt or innocence, it could be used by the State to preemptively rehabilitate a *testifying co-defendant* who it anticipated would be subject to impeachment attempts by the defendant on the basis that the co-defendant's testimony against him was influenced by the disposition in the related case. ***Borden,* 605 S.W.2d at 90-91**; ***see also, State v. Lingar,* 726 S.W.2d 728, 734-735 (Mo. banc 1987)**. The rationale given for the exception was that the State, just as a defendant, had a right to explain the interest or bias of a witness, including the right to develop any interest or bias, or the lack thereof, on direct examination in anticipation of impeachment attempts of a testifying co-defendant by the defendant.

But it has been recognized that the ***Borden*** exception is inappropriate in situations where there is nothing in the record to suggest that the co-defendant's guilty plea was the result of any plea bargain or agreement to testify against the Defendant. ***State v. White,* 952 S.W.2d at 805-806**. In ***White***, the prosecutor elicited testimony from a co-defendant that the co-defendant had pleaded guilty to the same robberies for which Defendant White was standing trial. ***Id.* at 804**. The appellate Court reversed White's conviction, noting that "there is nothing in the record that suggests [the co-defendant's] guilty plea

was the result of any plea bargain or agreement to testify against [White]. ***Id.* at 805-806**. The Court continued:

> Thus, the rational of *Borden* and *Taylor*, that the State may be permitted to anticipate cross-examination by the defendant leaving a false impression with the jury of government concealment, is inapplicable on the record before us. If [the co-defendant's] plea and sentence were not the result of a plea bargain, and nothing in this record suggests they were, Defendant is surely unlikely to bring this out on cross-examination. The fact that a codefendant has nothing to gain by identifying Defendant as an accomplice would tend to bolster his credibility, not impeach it. Thus, on the record before us, we hold that the State had no basis of anticipating Defendant would raise [the co-defendant's] prior guilty plea on cross-examination…

Id.* at 806**. The same analysis applies in Mr. McGowan's case. There is nothing on the record to indicate that either Ms. Bost or Ms. Malone received any type of plea bargain or agreement to testify against Mr. McGowan. Defense counsel did not attempt to impeach them with any such evidence. Therefore, pursuant to this Court's opinion in ***White, supra, the State should not have been permitted to inquire about the co-defendants pleas pursuant to the ***Borden*** exception.

In addition to the improper admission of this evidence during the State's case-in-chief, the State also impermissibly argued in closing that the jury could infer from the co-defendants pleas of guilty that Mr. McGowan was guilty as well:

Either way Glen McGowan knew that this thing was broken and by looking at that you've got to know that there is something wrong that this thing is stolen. Even Barbara Bost said yeah I probably knew it was stolen, too. She didn't want to admit it, although she had pled guilty to it.

(TR 256).

……

He talks about the two women that came in and testified. Think back on their testimony. I find it somewhat ironic, although not surprising, they come in today to say there was just the three of us, the four of us hung together as friends but only three of us are bad people. Mr. McGowan had nothing to do with it. This happens after they have pled.

(TR 267).

It is reversible error for the State to argue to the jury in closing argument that it can infer from such evidence the defendant is guilty in that his co-defendant had already been convicted or pled guilty. ***See State v. Boyd*, 954 S.W.2 d 602, 609 (Mo. App., W.D. 1997); *State v. Yingst,* 651 S.W.2d 641, 643-44 (Mo. App., S.D. 1983)**. In *Boyd, supra,* the appellate court "condemn[ed] the argument of the prosecutor as being outside the permissible bounds of closing argument." ***Boyd*, 954 S.W.2d at 609**. In ***Boyd***, no plain error resulted in that the argument did not have a decisive effect on the jury because there was also eye-witness testimony from a police officer. But the same cannot be said of this case.

No witness testified that Mr. McGowan knew that the truck was stolen; in fact, the evidence revealed that he was at work when the truck was stolen (TR 243-244). The State's case was wholly circumstantial. When Trooper Maddox pulled in behind Mr. McGowan, Mr. McGowan immediately pulled to the right lane and then exited the Interstate at the first exit, Highway 19 (TR 136). Mr. McGowan was calm, cooperative and helpful with the Troopers (TR 150). He did not attempt to fight or flee (TR 152). He gave them his correct name (TR 166). Mr. McGowan was not under the influence of any substance (TR 152-153, 174-175). He told the troopers that he did not know what was going on; he had just met Ms. Bost[9] and he was going with them to a party in Columbia (TR 152, 166, 176). Mr. McGowan said that Mr. Brown had provided the vehicle, and that Mr. McGowan did not know how to get the truck started (TR 169). He did not know that the truck was stolen (TR 170, 176).

The State cannot use the guilty pleas of Bost and Malone to argue that Mr. McGowan should be convicted because they also pleaded guilty. This argument was, again, "outside the bounds of permissible closing argument." ***Boyd, supra***. Prosecutors must remain impartial. ***State v. Storey,* 901 S.W.2d 886, 901 (Mo. banc 1995)**. After all, they share the trial court's obligation to guarantee the defendant gets fairly tried. ***State v. Tiedt,* 206 S.W.2d 524, 526 (Mo. banc 1947)**. Prosecutors occupy a "quasi-judicial position**."** ***Id.; accord* Rule 4-3.8**, Comment. They must not become "a heated

[9] Ms. Bost had just met Mr. McGowan that day, and at trial, she thought his name was Billy (TR 178).

partisan, nor engage in vituperation of the [defendant]." ***Tiedt, supra* at 526**. They have a duty to seek justice, not just a conviction. ***Berger v. U.S.*, 295 U.S. 78, 88 (1935)**. They must not inject into the jurors' minds any matter that would add to the prejudice already produced by the charge. ***Tiedt, supra* at 527; *State v. Horton*, 193 S.W. 1051, 1054 (Mo. 1913)**.

Like prosecutors, trial judges must also ensure that the defendant gets fairly tried. ***Tiedt, supra***. Although judges have wide discretion in controlling closing arguments, they have no discretion to allow plainly unwarranted and injurious arguments. ***Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)**. This is true even, as here, when counsel doesn't object. After all, judges aren't passive moderators. They must correct, even *sua sponte*, errors that could significantly promote a just determination of the trial. I ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.1(2ed. 1979). In failing to intervene to correct the prosecutor's erroneous introduction of evidence and argument, or to declare a mistrial, the trial court plainly erred, resulting in manifest injustice. This Court must reverse and remand for a new trial.

CONCLUSION

Because the trial court abused its discretion in failing to declare a mistrial when the prosecutor, in front of the jury, invited Mr. McGowan to testify, (Point I); and because the trial court erred in failing to instruct the jury on Mr. McGowan's claim of right defense (Point II); and because the trial court plainly erred in allowing the prosecutor to present evidence and argue the co-defendant's plea dispositions as evidence of Mr. McGowan's guilt (Point III), Mr. McGowan respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

_____
Amy M. Bartholow, MOBar #47077
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594
Amy.Bartholow@mspd.mo.gov

ATTORNEY FOR APPELLANT

Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **8,090** words, which does not exceed the 31,000 words allowed for appellant's opening brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every month (i.e., last updated October 2005). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were mailed, this 4th day of November, 2005, to Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Amy M. Bartholow

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87193
	)	
GLEN E. McGOWAN,	)	
	)	
Appellant.	)	

APPELLANT'S APPENDIX

Page